

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD BACH, et al.,

Plaintiffs,

v.

FOREVER LIVING PRODUCTS U.S., INC., et
al.,

Defendants.

No. C05-970MJP

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT ON
COPYRIGHT INFRINGEMENT OF
JONATHAN LIVINGSTON
SEAGULL CHARACTER AND
DENYING DEFENDANTS' CROSS
MOTION

This matter comes before the Court on the parties' cross motions for partial summary judgment on Plaintiffs' copyright claims regarding the Jonathan Livingston Seagull character. (Dkt. Nos. 79 & 97). Having considered the parties' briefs, including Plaintiffs' supplemental brief (Dkt. No. 129), as well as all of the documents submitted in support thereof, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' motion and DENIES Defendants' motion. The Court also DENIES Defendants' motion to strike.

BACKGROUND

Many of the facts pertinent to these motions have already been described. As explained in the order on Plaintiffs' trademark claims, (Dkt. No. 143) this case arises from Defendants' use of the title, character, name, text, and photographs associated with the book Jonathan Livingston Seagull. The book was written by Richard Bach and was published in 1970. The photographs which appear in the book were taken by Russell Munson. Mr. Bach and Mr. Munson are the plaintiffs in this case.

1 Defendants Forever Living Products U.S., Forever Living Products International, and Aloe
2 Vera of America (collectively “Forever Living Products” or “FLP”) are affiliated companies that
3 manufacture and distribute health and beauty products through “direct sales” or “multi-level
4 marketing,” in a fashion similar to that used by the company Avon. (Lloyd Decl. ¶ 2). The name
5 “Forever Living Products” also refers to over 150 domestic and foreign affiliated businesses that sell
6 and distribute Forever Living health and beauty products. (*Id.*). Defendant Forever Resorts provides
7 management services for resorts located in the United States. (*Id.* ¶ 6). Rex Maughan is the founder,
8 CEO, and President of FLP and is a manager of Defendant Forever Resorts. Rex Maughan also has
9 an ownership interest in substantially all of the 100+ foreign affiliates of Forever Living Products. (*Id.*
10 ¶ 9).

11 Plaintiffs allege that Defendants have used a copyrighted photograph from Jonathan
12 Livingston Seagull as their corporate logo, and have used copyrighted excerpts from Jonathan
13 Livingston Seagull, and the copyrighted story and character of Jonathan Livingston Seagull in their
14 advertising, promotional, and training materials, in communications with their independent
15 distributors, in their sale and distribution of FLP products, and in the advertising, marketing and
16 promotion of Forever Resorts’ recreational properties. (Third Am. Compl. ¶ 4).

17 In support of their argument that FLP has infringed the Jonathan Livingston Seagull character,
18 Plaintiffs present evidence of how FLP has used the Jonathan Livingston Seagull character to
19 motivate, unify, and recruit new distributors into the organization. In its own publications and public
20 statements, FLP itself explains how it has used the Jonathan Livingston Seagull character. For
21 example, in a recent promotional video, FLP’s Marketing Director, Aidan O’Hare explained the
22 power of the “Jonathan brand”:

23 That’s brand power. And that’s what we’ve built here in Forever over 25 years is a brand
24 power. People want aloe vera. They think Forever. And that’s what the importance of
a brand is. You help the decision made prior to them actually going in and using the
product.

25 No one can doubt the power of Jonathan. Look back over the last 25 years. We’ve built
26 a brand that is just remarkable. . . .

1 For example, I remember getting off a plane in Sweden and you know I was new and
 2 didn't know where I was going and I looked in the crowd and there's a guy with a sign
 3 with Jonathan on it. And immediately you are with family, you're with friends. And
 4 that's what you'll feel when you come here. You'll see all the Jonathans around the hotel
 5 and you see them when you go back to your own country.

6 Jonathan means more than . . . just a design on a piece of paper. It means the feeling that
 7 Forever is and what it has built over the last 25 years. And we want to build on that. Rex
 8 said I want the brand to say quality. I want it to say cleanliness. I want it to be
 9 transparent. I want it to say value. All the things which are vitally important. And so we
 10 started to build the packets that you see now.

11 First of all, let's talk about Jonathan. Jonathan was an ordinary bird that went beyond.
 12 And that's pretty much where our brand is going now, and so we put Jonathan at the top
 13 of the package. And also we did it with a foil treatment which means he shines. It's in
 14 recognition of our 25 years. Jonathan is really the basis of what Forever is about. It's
 15 taking ordinary things and making them extraordinary. . . .

16 And what better way can Rex demonstrate his commitment to us and our future and the
 17 time and the energy and resources gone into strengthening the Jonathan brand and
 18 providing us with the best packaging possible to build into the next 25 years. . . .¹

19 (Geyman Decl., Ex. 13) (emphasis added).

20 Similarly, in 2004, FLP created a "Style Guide" entitled "Helping the Brand Soar — Forever
 21 Living Products Style Guide." In the guide, FLP dictates how the "Jonathan Livingston Seagull"
 22 logo is to be used and presented. The guide explains that "[t]he Forever Living Products logo,
 23 Jonathan Livingston Seagull, represents the company's ability to continually soar higher — no matter
 24 what. Jonathan inspires strength through consistency, and is a key part of establishing and
 25 maintaining a lasting corporate image." (Id., Ex. 14).

26 Other statements made by FLP and its employees show how FLP used the Jonathan
 Livingston Seagull character as a metaphor for the philosophy of the company. For example, one
 FLP Vice President described his introduction to FLP:

It was in late May 1978 that I attended a meeting of a brand new company that
 marketed aloe vera (whatever that was!). I was told that the philosophy of this
 company was based on the story of Jonathan Livingston Seagull, which immediately
 grabbed my attention.

¹ Aiden O'Hare stated during his deposition that this video was shown at an FLP rally in
 Dallas attended by 3,000 FLP distributors from around the world. (Phillips Decl., Ex. 16 (O'Hare Dep.
 at 201-206)).

1 (Id., Ex. 16). Another example is an article in a May 2005 issue of Forever New Zealand describing
2 the meaning behind the seagull logo:

3 People often ask us what a picture of a seagull is doing on all our products, so we
4 thought we'd best put in an explanation. When Rex Maughan was first starting to
5 create Forever Living Products, he of course needed a logo. What came to his mind
6 was a book he had read as a young man that has been a great source of inspiration to
7 him, a book called Jonathan Livingston Seagull. . . . Because Rex was so moved by this
8 story, he decided to use Jonathan as the enduring logo of Forever Living Products. It's
9 a story of one bird that doesn't want to settle for the limitations put on him by other
10 birds, and through persistence and practice is able to fly faster, higher, and further than
11 all the rest. He of course goes on to teach others how they can do it too! Sounds a
12 lot like FLP distributors, doesn't it?

13 (Id., Ex. 60). And the FLP website, www.foreverliving.com, used to include the following text:

14 "Dare to Soar" — just like Jonathan Livingston Seagull. Jonathan's story, told in
15 Richard Bach's "Jonathan Livingston Seagull," serves as an inspiration and provides us
16 with a wealth of valuable lessons about our own business. Jonathan succeeded not
17 because he was any different from his fellow seagulls or because he had more money,
18 opportunity or credentials. He succeeded because he worked a little harder, slept a little
19 less, believed in himself a little more, and went out and "did it" again and again. Despite
20 intense criticism and rejection, in the face of failure, personal injury and loneliness,
21 Jonathan never gave up; he stayed the course and believed strongly in what he was
22 doing. That's why he remains a proud symbol of Forever Living Products' spirit to this
23 day!

24 (Id., Ex. 62).

25 Plaintiffs point to other evidence that demonstrates how FLP used the Jonathan Livingston
26 Seagull character. First, FLP has consistently called its logo "Jonathan Livingston Seagull" or
"Jonathan." (Id., Ex. 16-17). Second, for over 20 years, FLP has given "Jonathan" bonuses to
successful distributors. (Id., Ex. 18). As explained in an FLP publication,

27 This bonus is named after Jonathan Livingston Seagull, the allegorical seagull from the
28 story by Richard Bach. One theme of the allegory is that 'The gull sees farthest who
29 flies highest'. The GEM Managers are the managers in Forever Living Products who
30 have flown the highest and, therefore, receive these very lucrative additional bonus
31 incentives.

32 (Id., Ex. 20). Third, FLP gives top-selling distributors statues of "Jonathan Livingston Seagull". (Id.,
33 Ex. 21). Fourth, FLP calls its distributors "Jonathans". (Id., Ex. 22). And fifth, FLP holds "Jonathan
34 Days" to recognize and reward distributors. (Id., Ex. 23). Plaintiffs allege that this, and other,
35 evidence proves that FLP has infringed on the Jonathan Livingston Seagull character in violation of
36 the Copyright Act, 17 U.S.C. § 501.

1 The parties have brought cross-motions for summary judgment on the issue of copyright
2 infringement of the Jonathan Livingston Seagull character. The parties dispute whether (a) Plaintiffs
3 still own the copyright to the Jonathan Livingston Seagull character; (b) the character copyright is
4 valid; and (c) FLP actually copied or infringed the character of Jonathan Livingston Seagull. In their
5 response to Plaintiffs' motion, Defendants request that the Court strike all documents created by
6 "non-defendant entities."

7 ANALYSIS

8 I. Motion to Strike

9 Defendants move to strike as irrelevant materials presented by Plaintiffs that were created by
10 "non-defendant entities." (FLP Resp. at 3). Defendants are referring to materials from FLP's foreign
11 affiliates, such as Forever Living India and Forever Living New Zealand. Plaintiffs oppose the motion
12 to strike. Plaintiffs argue that because FLP directly supervises and controls these affiliated offices and
13 because they are wholly-owned by Rex Maughan, the materials produced by the foreign offices are
14 relevant.

15 The motion to strike is DENIED. Defendants' relevance objection is not a sufficient reason
16 to strike the exhibits. See, e.g., Powers v. Runyon, 974 F. Supp. 693, 697 (S.D. Ind. 1997) (noting
17 that it is normally "inappropriate . . . to strike materials submitted in support of or in opposition to a
18 motion for summary judgment on the grounds of relevance"). Moreover, the motion is moot because
19 even without the evidence from foreign affiliates, there is ample evidence of copying by the named
20 Defendants.

21 The Court takes a moment to note its frustration with the parties' overuse of footnotes in
22 their briefing throughout this case. Defendants brought their motion to strike in a footnote in their
23 responsive brief. The practice of putting substantive material in footnotes provides difficult reading
24 for the Court and is used by the parties to avoid the page limitations in the local rules. It is also poor
25 advocacy: a request in a footnote is much more likely to be overlooked or missed by the Court. If an
26 argument is worth making, a party should put the argument in the body of its brief.

II. Standard on Summary Judgment

This matter is before the Court on the parties' cross-motions for summary judgment. Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The underlying facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "Summary judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970). However, once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). To discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must have evidence showing that there is a genuine issue for trial. Id. at 324.

Where the parties file cross-motions for summary judgment, "[t]he court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." Fair Housing Council of Riverside County v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001) (quoting 10A Charles Alan Wright, et al., Federal Practice and Procedure § 2720, at 335-36 (3d ed. 1998)). "In fulfilling its duty to review each cross-motion separately, the court must review the evidence submitted in support of each cross-motion." Riverside Two, 249 F.3d at 1136.

A central issue in most copyright infringement cases is whether the allegedly infringing and infringed works are "substantially similar." "Although summary judgment is not highly favored on questions of substantial similarity in copyright cases, summary judgment is appropriate if the court can conclude, after viewing the evidence and drawing inferences in a manner most favorable to the non-moving party, that no reasonable juror could find substantial similarity of ideas and expression

1 Where reasonable minds could differ on the issue of substantial similarity, however, summary
 2 judgment is improper.” Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002)
 3 (quoting Shaw v. Lindheim, 919 F.2d 1353, 1355 (9th Cir. 1990)). If a triable issue of fact is shown
 4 on the “extrinsic” prong of the substantial similarity analysis, then the “intrinsic” inquiry must be left
 5 to the jury and summary judgment must be denied. Cavalier, 297 F.3d at 824.

6 **III. Copyright Infringement**

7 To establish copyright infringement, a plaintiff must prove (1) ownership of a valid copyright
 8 and (2) copying of constituent elements of the work that are original. Feist Publ’ns, Inc. v. Rural Tel.
 9 Serv. Co., 499 U.S. 340, 361 (1991); Funky Films, Inc. v. Time Warner Entm’t Co., 462 F.3d 1072,
 10 1076 (9th Cir. 2006). In this case, Defendants challenge, and Plaintiffs seek to establish, all three
 11 elements — ownership, the validity of the copyright in the Jonathan Livingston Seagull character, and
 12 copying.

13 **A. Ownership of Copyright**

14 Defendants challenge Plaintiffs’ ownership of the copyright at issue. As Plaintiffs point out, a
 15 certificate of copyright registration is prima facie evidence of the validity of a copyright. 17 U.S.C.
 16 410(c)(1994); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 488-89 (9th Cir. 2000). Plaintiffs
 17 possess copyright registrations and renewals for Jonathan Livingston Seagull. (Geyman Decl., Ex.
 18 51). Defendants argue that they can rebut the presumption in this case — they argue that Plaintiffs
 19 assigned the copyright in the Literary Purchase Agreement (“LPA”) executed with Hall Bartlett in
 20 1972. Defendants also argue that Plaintiffs’ “secretive efforts to strike a deal with the current holder
 21 of the Bartlett rights . . . to share proceeds from the litigation . . . raises an issue of fact [on the issue
 22 of] ownership of any copyright in the JLS character.” (FLP Resp. at 25). But as the Court concluded
 23 in its previous order on Plaintiffs’ trademark claims, the LPA licensed to Bartlett only the rights to the
 24 novel for the purposes of making a movie and associated merchandising, and reserved to Mr. Bach all
 25 rights not granted to Mr. Bartlett. The LPA also expressly grants Mr. Bach the right to enforce any
 26 infringement of any rights licensed under the LPA. The LPA therefore does not limit Mr. Bach’s
 right to enforce the copyright here. And Plaintiffs point out that Mr. Bach purchased his copyrights

1 out of bankruptcy in 1982 and has held them ever since. (Supp. Geyman Decl., Ex. D & E). The
 2 Court concludes as a matter of law that Mr. Bach owns the copyright at issue here.

3 **B. Validity of Character Copyright**

4 A court may decide on summary judgment whether a character deserves copyright protection.
 5 See Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 754-55 (9th Cir. 1978) (affirming grant of
 6 summary judgment holding that Disney characters were protected by copyright); Newton v.
 7 Diamond, 204 F. Supp. 2d 1244, 1253 (C.D. Cal. 2002). “While characters are ordinarily not
 8 afforded copyright protection . . . characters that are ‘especially distinctive’ or the ‘story being told’
 9 receive protection apart from the copyrighted work.” Rice v. Fox Broad. Co., 330 F.3d 1170, 1175
 10 (9th Cir. 2003). Courts have given copyright protection to characters that are highly delineated or
 11 play a central role in an overall work. See Anderson v. Stallone, 11 U.S.P.Q.2d 1161, 1165-67 (C.D.
 12 Cal. 1989) (concluding that Rocky characters are both highly delineated and the “story being told” in
 13 the movies Rocky I, II, and III); Toho Co., Ltd. v. William Morrow and Co., 33 F. Supp. 2d 1206,
 14 1216 (C.D. Cal. 1989) (Godzilla character protected); Metro-Goldwyn-Mayer, Inc. v. Am. Honda
 15 Motor Corp., 900 F. Supp. 1287, 1297 (C.D. Cal. 1995) (James Bond character protected);
 16 Universal City Studios, Inc. v. Kamar Indus., Inc., 217 U.S.P.Q. 1162, 1165 (S.D. Tex. 1982) (E.T.
 17 character protected); see also Shaw v. Lindheim, 919 F.2d 1353, 1363 (9th Cir. 1990) (relying on
 18 similarity between plaintiff and defendant’s lead characters in determining that plaintiff had raised a
 19 triable issue of fact on substantial similarity of entire works). But where the characters are not
 20 sufficiently delineated or are not the central focus of the work, courts decline to give the characters
 21 copyright protection. See Rice, 330 F.3d at 1175-76 (holding that magician who wore standard
 22 magician garb and revealed magic tricks and who was not the focus of the story was not protected
 23 under copyright); Cavalier, 297 F.3d at 825 (holding that anthropomorphized moon character is
 24 unprotectable stock character in children’s literature); Olson v. Nat’l Broad. Co., 855 F.2d 1446,
 25 1452-53 (9th Cir. 1988) (holding that characters in television series — three Vietnam veterans who
 26 conducted scams in Vietnam and continue to do so as civilians — were not delineated enough to
 warrant copyright protection).

1 In determining whether a character deserves copyright protection, courts look at the many
2 elements of the character — visual depictions, name, dialogue, relationships with other characters,
3 their actions and conduct, personality traits, and written descriptions — to determine whether it is
4 sufficiently delineated such that it is a unique expression. See Funky Films, 462 F.3d at 1078-79
5 (looking at characters’ actions, dialogue, and interactions with other characters); Olson, 855 F.2d at
6 1452 (looking at character summaries in series treatment, dialogue, and action when determining
7 whether character deserved protection); Anderson, 11 U.S.P.Q.2d at 1166-67 (considering Rocky’s
8 physical attributes, speaking mannerisms, and the fact that his name was also the title of the movies
9 about him); see also Shaw, 919 F.2d at 1363 (noting lead character’s main personality trait — self-
10 assuredness — and the fact that he was well dressed, wealthy, and had expensive taste).

11 Defendants argue here that the Court needs to “dissect” the Jonathan Livingston Character to
12 decipher which elements of the character are protectable and which are not before comparing the
13 protectable ones to Defendants’ allegedly infringing work. It is true that in the context of an assertion
14 that an entire literary work, or song, or computer program infringes on another, courts have dissected
15 the work in search of its protectable elements. For example, in Rice, a case about whether
16 defendant’s television series infringed on plaintiff’s script and video, the Ninth Circuit explained that
17 it “must distinguish between the protectable and unprotectable material because a party claiming
18 infringement may place ‘no reliance upon any similarity in expression resulting from unprotectable
19 elements.’” Rice, 330 F.3d at 1174 (quoting Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435,
20 1446 (9th Cir. 1994)). In Cavalier, a case about whether defendant’s children’s book series infringed
21 on plaintiff’s book series, the Ninth Circuit explained that “when applying the extrinsic test, a court
22 must filter out and disregard the non-protectable elements in making its substantial similarity
23 determination.” Cavalier, 297 F.3d at 822. But in cases that have focused substantially on character
24 infringement, rather than considering the character as one element of an entire story, courts have not
25 done a similar dissection. See Anderson, 11 U.S.P.Q.2d at 1166 (looking at combination of physical
26 and emotional characteristics, speaking mannerisms, interrelationships, and the fact that the name of
the character is also the title of the movie to determine that Rocky character deserves copyright

1 protection); Toho, 33 F. Supp. 2d at 1216 (C.D. Cal. 1998) (determining that Godzilla character was
 2 well-defined and highly delineated because “Godzilla is always a pre-historic, fire-breathing, gigantic
 3 dinosaur alive and well in the modern world”); Metro-Goldwyn-Mayer, 900 F. Supp. at 1296
 4 (concluding that James Bond character was sufficiently delineated and the “story being told” and
 5 pointing to his “cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred;’ his
 6 marksmanship; his ‘license to kill’ and sue of guns; his physical strength; [and] his sophistication”);
 7 see also Shaw, 919 F.2d at 1363 (looking at the combination of elements that make up lead character
 8 — he was well dressed, wealthy, had expensive taste and was self-assured).

9 Thus it is the unique combination of elements that makes up a protected character. The Court
 10 will therefore consider whether Jonathan Livingston Seagull is sufficiently delineated or “the story
 11 being told” considering the combination of all the elements of his character.

12 Plaintiffs argue that like Rocky, James Bond, Godzilla, and others, Jonathan Livingston
 13 Seagull is a highly delineated character that warrants copyright protection. Plaintiffs contend that the
 14 Jonathan Livingston Seagull character is a “one-of-a-kind seagull — a thinking, talking,
 15 philosophizing, risk-taking, limit-testing seagull.” (Pls.’ Resp. at 7). Specifically, they explain that
 16 Plaintiffs’ expression, revealed through the dialogue, thoughts, actions, and interactions in the book,
 17 is:

- 18 (1) an image of an ordinary seagull;
- 19 (2) with an extraordinary name, Jonathan Livingston Seagull;
- 20 (3) who is anthropomorphized into a human-like character who distinguishes himself by
 21 flying higher and faster and farther than any gull has ever flown before;
- 22 (4) and who emerges as an extraordinary and enlightened seagull who teaches other
 23 seagulls so that they might similarly lift themselves from a conventional life of
 scavenging the shores for food to extend themselves and succeed beyond their
 ordinary lives.

24 (Pls.’ Resp. at 7-8). This description accurately reflects Plaintiffs’ rendering of the Jonathan
 25 Livingston Seagull character in the novel, which has been included as one of the exhibits.² (See

26 ² Defendants argue that Plaintiffs have not identified the “source”, that is, the specific
 sections of the novel, that give rise to the Jonathan Livingston Seagull character. But as Plaintiffs point
 ORDER - 10

1 McDougall Decl. ¶ 3, at 13-78). Moreover, the name of the character and the title of the book are
2 the same.

3 Defendants argue that the Jonathan Livingston Seagull character can be reduced either to a
4 collection of unprotectable ideas (see FLP Resp. at 11-13) or to a combination of unprotectable
5 elements (see FLP Mot. at 6; FLP Reply at 6-7). First, FLP points to three common ideas in the
6 Jonathan Livingston Seagull character: a character who pursued a higher purpose despite obstacles,
7 criticism, and ostracism, and achieved reward; a character who sought to overcome the ordinary to
8 become extraordinary; and a character who sought to help others realize their potential. (FLP Resp.
9 at 12). FLP argues that these themes are common literary themes that do not deserve protection.
10 Second, FLP argues that (1) images of animals in nature are not protectable, (2) Jonathan Livingston
11 is not an original name (it is the name of a pilot Mr. Bach knew), (3) the story of an
12 anthropomorphized seagull is a common one, and (4) the story of a character emerging extraordinary
13 and enlightened is a stock story. FLP also points out that Jonathan's physical characteristics are not
14 well delineated in the story, which Plaintiffs do not contest. And FLP argues that the Jonathan
15 Livingston Seagull character has not been developed over time, as was the case in the cases involving
16 James Bond and Godzilla.

17 FLP's arguments are misplaced. Every literary character has elements that are not original,
18 but, as explained above, courts look to the combination of those elements to determine whether the
19 character is protectable. Like other highly delineated literary and film characters, the Jonathan
20 Livingston Seagull character is protected under copyright. Jonathan Livingston Seagull is a well-
21 defined character — an ordinary seagull named Jonathan Livingston Seagull who is determined to fly
22 higher and faster, who transcends his beginnings, and who teaches others to do the same. He is not a
23 stock character and the fact that his character has not been delineated over time is inconsequential.

24
25
26 out, Jonathan Livingston Seagull is delineated on almost every page of the novel. And Plaintiffs have also
pointed to specific passages that support their characterization of the Jonathan Livingston Seagull
character. (See Pls.' Resp. at 7-8 and nn. 16-17).

1 See Kamar Indus., 217 U.S.P.Q.2d at 1167 (granting preliminary injunction regarding E.T.
2 character).

3 Defendants also argue that the Jonathan Livingston Seagull character is not protectable under
4 the merger and scenes a faire doctrines. Copyright protection only extends to original expressions,
5 not ideas. Metcalf v. Bochco, 294 F.3d 1069, 1074 (9th Cir. 2002). When an idea and expression
6 merge, there is no copyright protection. Rice, 330 F.3d at 1174. As one court explained, where the
7 underlying ideas are, for example, jewel-encrusted bee forms, stuffed dinosaurs, or karate video
8 games, a high degree of similarity is inevitable between the allegedly infringing and infringed works
9 because it is difficult to express the underlying idea in more than one way. Shaw, 919 F.2d at 1360.
10 Moreover, under the similar doctrine of “scenes a faire,” the “expressions indispensable and naturally
11 associated with the treatment of a given idea are treated like ideas and are therefore not protected by
12 copyright.” Rice, 330 F.3d at 1175 (internal quotation marks omitted). Thus, in the case of a story
13 about a magician revealing the secrets behind magic tricks, the story line of a masked magician
14 revealing tricks flowed naturally from the idea and was found to be unprotectable. Id. at 1176.

15 These doctrines are not applicable here. The expression of the Jonathan Livingston Seagull
16 character does not flow from the ideas underlying it. The themes and ideas Jonathan Livingston
17 Seagull espouses are not, as Defendants argue, monopolized by the fact that his character is protected
18 by copyright. Indeed, there are limitless metaphors for the ideas of achievement, perseverance, and
19 enlightenment. The unique expression of those ideas through the story of Jonathan Livingston
20 Seagull is protectable.

21 In addition, to the extent that a character is protectable because it is the “story being told,”
22 Jonathan Livingston Seagull is protectable. He is the “story being told” and is not a mere “chessman
23 in the game of telling the story.” See Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., 216 F.2d
24 945, 950 (9th Cir. 1954) (opining that “[i]t is conceivable that the character really constitutes the
25 story being told, but if the character is only the chessman in the game of telling the story he is not
26 within the area of the protection afforded by the copyright”). He is the title character in a book that

1 is entirely about his development from an ordinary seagull to an extraordinary one. His character is
2 protectable under this doctrine as well.

3 **C. Infringement**

4 “Absent direct evidence of copying, proof of infringement involves fact-based showings that
5 the defendant had access to the plaintiff’s work and that the two works are substantially similar.”
6 Funky Films, 462 F.3d at 1076 (internal quotation marks omitted). Where a high degree of access is
7 shown, the Ninth Circuit employs the “inverse ratio rule” and “require[s] a lower standard of proof of
8 substantial similarity.” Rice, 330 F.3d at 1178. To determine whether two works are “substantially
9 similar,” the Ninth Circuit applies a two-part analysis — an extrinsic test and an intrinsic test. Funky
10 Films, 462 F.3d at 1077. “At summary judgment, courts only apply the extrinsic test; the intrinsic
11 test, which examines an ordinary person’s subjective impressions of the similarities between two
12 works, is exclusively the province of the jury.” Id.; Shaw, 919 F.2d at 1360-61 (noting that it is for
13 the jury to decide whether the total “concept and feel” of the works are similar).

14 **1. The Allegedly Infringing Work**

15 One issue in this case is the vast difference in media between the allegedly infringing and
16 infringed works. This is not a case where one author allegedly used the creative expression of
17 another in his own literary work. Instead, Plaintiffs argue that FLP copied the combined expressive
18 elements of the Jonathan Livingston Seagull character in creating FLP’s “Jonathan” brand. Plaintiffs
19 explain: “FLP has expressed its ‘Jonathan’ brand by using the character as the embodiment of the
20 company, its graphic representation and expressive icon, its unifying story and text, the name of its
21 logo which it calls ‘Jonathan Livingston Seagull,’ and as the character model that it urged its millions
22 of distributors to emulate.” (Pls.’ Resp. at 12-13).

23 FLP disputes the characterization of its “brand.” FLP argues that its brand is not the
24 “Jonathan” brand; FLP argues that its brand is composed of its products, organizational culture and
25 attributes, personal identity, and expression, including the Forever Living name and its distinct
26 rendering, none of which bears any relations to Jonathan Livingston Seagull. (FLP Reply at 13).
Specifically, FLP argues that “Jonathan” refers to the graphic symbol of the company, not the brand;

1 that FLP has not consistently throughout its business used the Jonathan Livingston Seagull symbol or
 2 name; and that the Style Guide relied upon by Plaintiffs was never completed, implemented, or used.
 3 FLP also presents evidence indicating that none of its 81 trademarks or its product names include the
 4 words “Jonathan” or “Jonathan Livingston Seagull” (Supp. McDougall Decl., Ex. I-J), and that its
 5 marketing plan is not based on Jonathan Livingston Seagull. (*Id.*, Ex. N). And FLP has presented
 6 expert testimony that rebuts Plaintiffs’ expert’s conclusion that the FLP brand is the “Jonathan”
 7 brand. (McDougall Decl., Ex. O, F). FLP asserts that the evidence it has proffered regarding its
 8 brand warrants denial of Plaintiffs’ copyright claims and, at the very least, raises a genuine issue of
 9 material fact about the role and significance of the Jonathan Livingston Seagull character to the
 10 Forever Living brand.

11 “The question in each case is whether the similarity relates to matter that constitutes a
 12 substantial portion of plaintiff’s work -- not whether such material constitutes a substantial portion of
 13 defendants work.” 4 Nimmer, Nimmer on Copyright, § 13.03[A][2][a] (2006) (emphasis added); see
 14 also Worth v. Selchow & Righter Co., 827 F.2d 569, 571 n.1 (9th Cir. 1987) (“[T]he relevant inquiry
 15 is whether a substantial portion of the protectable material in the plaintiff’s work was appropriated —
 16 not whether a substantial portion of defendant’s work was derived from plaintiff’s work.”). Thus, the
 17 fact that FLP may not have based its entire brand on the Jonathan Livingston Seagull character is not
 18 material. Here, Plaintiffs have alleged that FLP appropriated a substantial portion of Plaintiffs’ work
 19 — the entire Jonathan Livingston Seagull character. Defendants’ argument that their use is basically
 20 de minimis is not supported by the record in this case. The Court will compare the Jonathan
 21 Livingston Seagull character to those elements of the Forever Living brand that utilized the Jonathan
 22 character.

23 2. Substantial Similarity — Extrinsic Test

24 Although Plaintiffs have presented evidence of direct copying in this case, the Court analyzes
 25 Defendants’ alleged infringement under the substantial similarity test. As Professor Nimmer has
 26 explained, even where there is evidence of direct copying, “copying as a legal proposition must still be
 established; hence, substantial similarity remains an indispensable element of plaintiff’s proof, even in

1 cases (such as Feist [Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)]) in which
 2 defendant does not contest factual copying.” 4 Nimmer, supra, § 13.01[B].

3 Plaintiffs argue that the Jonathan Livingston Seagull character that is part of the FLP brand is
 4 substantially similar to the Jonathan Livingston Seagull character in Plaintiffs’ book. As mentioned,
 5 the Court only considers the “extrinsic” test for substantial similarity; it is up to the jury to determine
 6 whether the works are substantially similar under the “intrinsic” test. See Funky Films, 462 F.3d at
 7 1077. The extrinsic test is an objective measure of the articulable similarities between the expressive
 8 elements of the works. Funky Films, 462 F.3d at 1077; Rice, 330 F.3d at 1174. Where a high degree
 9 of access to the infringed work is shown, there is a lower standard of proof of substantial similarity.
 10 Rice, 330 F.3d at 1178. The underlying question in this analysis is whether “[t]he totality of the
 11 similarities [between the works] . . . goes beyond the necessities of the . . . theme and belies any claim
 12 of literary accident.” Metcalf, 294 F.3d at 1074 (quoting Shaw, 919 F.2d at 1363).

13 In this case, FLP’s access to the work is uncontested. FLP publications describe how Rex
 14 Maughan read Jonathan Livingston Seagull, found it to be a “great source of inspiration” and
 15 “decided to use Jonathan as the enduring logo of Forever Living Products.” (Geyman Decl., Ex. 60;
 16 see also id., Ex. 16 & 19).

17 The Court objectively compares individual aspects of the Jonathan Livingston Seagull
 18 character with the ways in which FLP has used the character:

- 19 (1) FLP uses an ordinary seagull, which is virtually identical to one of the copyrighted
 20 photographs in Plaintiffs’ book (Geyman Decl., Ex. 59);
- 21 (2) FLP calls its logo “Jonathan Livingston Seagull” (Id., Ex. 14, 16, 17);
- 22 (3) FLP uses Jonathan’s story of persevering to fly higher and faster than any gull has
 23 flown before to inspire its distributors to buy and sell more products and recruit more
 24 distributors. For example, a 1987 article in Forever Living Magazine quotes Jonathan
 25 Livingston Seagull and states: “We can lift ourselves out of ignorance, we can find
 26 ourselves as creatures of excellence, intelligence, and skill. We can be free! We can
 learn to fly!” in an article describing financial incentives and bonuses for distributors.
 (Supp. Geyman Decl., Ex. K). And in The Forever Enterprise, FLP’s VP of Finance,
 Glen Banks, quotes Jonathan Livingston Seagull and states: “The gull sees farthest
 who flies highest” in describing the “Jonathan Bonus” for FLP’s managers who have
 “flown highest” and therefore “receive these very lucrative additional bonus
 incentives.” (Geyman Decl., Ex. 20); and

1 (4) FLP suggests that, like Jonathan Livingston Seagull, its distributors will emerge as an
2 extraordinary group of “Jonathans” who will become new leaders and will recruit new
3 “Jonathans” and who will achieve financial success so they can lift themselves above
4 their ordinary lives. For example, in the 1986 issue of The Forever Lifestyle, the
5 author states “As you may recall, Jonathan Livingston Seagull soared to greater
6 heights by helping his students emulate his extraordinary flight skills. At Forever
7 Living Products, we too have Jonathans. They’re called Soaring Managers. These
8 special teachers have worked closely with five personally sponsored distributors,
9 helping each one develop the leadership skills necessary to become a Manager. Just
10 like Jonathan, our Soaring Managers will soon reach new realms as they evolve to
11 Gem status. We’d like to take this opportunity to recognize our ‘Jonathans’ and wish
12 them all happy soaring!” (*Id.*, Ex. 22).

13 Applying the inverse ratio rule, Plaintiffs’ burden to show objective similarity is lessened
14 because access to the novel and the Jonathan Livingston Seagull character is undisputed. Given the
15 evidence proffered by Plaintiffs, Plaintiffs have raised a triable issue of fact on the question of
16 substantial similarity. The Court concludes that there is objective similarity between Plaintiffs’
17 Jonathan Livingston Seagull character and the seagull character used by FLP as part of its brand. But
18 it remains for the jury to decide whether the total look and feel of the character and FLP’s use of
19 Jonathan Livingston Seagull as part of its brand are the same.

20 **IV. Other Issues**

21 Defendants raise two other minor issues. First, Defendants argue that to the extent Plaintiffs’
22 motion for summary judgment is against FLP founder and executive Rex Maughan, it must be denied
23 because he had not yet appeared or conducted any discovery when Plaintiffs brought their motion.
24 But Plaintiffs only brought their motion against the four corporate defendants, not Rex Maughan.
25 Rex Maughan has since appeared. (Dkt. No. 94). If Plaintiffs want to pursue summary judgment
26 against him on these same issues, they must do so by separate motion.

Second, Defendants argue that Plaintiffs cannot request summary judgment in favor of both
Mr. Bach and Mr. Munson because up until the motion, Plaintiffs claimed that Mr. Munson held
copyrights only in the photographs in U.S. editions of the book and that Mr. Bach held any copyright
in the Jonathan Livingston Seagull character. Defendants request that the Court deny any claim by
Mr. Munson for infringement of the Jonathan Livingston Seagull character. But Plaintiffs produced
as part of their initial disclosures a 1969 agreement between Mr. Bach and Mr. Munson under which

1 they agreed to divide the financial returns from the novel Jonathan Livingston Seagull on an 80/20
2 basis. (Second Supp. Geyman Decl., Ex. 21). Based on this agreement and Mr. Munson's financial
3 interest in the character, the Court declines to grant summary judgment denying Mr. Munson's claim
4 for infringement of the Jonathan Livingston Seagull character.

5 **CONCLUSION**

6 Because Plaintiffs own the copyrights and because the Jonathan Livingston Seagull character
7 is protectable, Plaintiffs have a viable claim for copyright infringement of the Jonathan Livingston
8 Seagull character. Plaintiffs have raised a triable issue of fact regarding whether the Jonathan
9 Livingston Seagull character and the seagull character used by Defendants as part of their brand are
10 substantially similar. The Court therefore DENIES Defendants' motion for summary judgment and
11 GRANTS IN PART AND DENIES IN PART Plaintiffs' motion. The Court also DENIES
12 Defendants' motion to strike.

13 The clerk is directed to send a copy of this order to all counsel of record.

14 Dated: February 13th, 2007.

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17 Marsha J. Pechman
18 United States District Judge
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